Supreme Court, U.S.
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No. 98-1051

In the
**SUPREME COURT OF THE UNITED STATES**
October Term 1998

EDWARD BOJEKIAN and FLORENCE BOJEKIAN,
Petitioners,

vs.

FORT LEE PLANNING BOARD, MAYOR and COUNCIL OF THE BOROUGH OF FORT LEE, and EAST/WEST VENTURE, a partnership of the State of New York,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

# BRIEF IN OPPOSITION TO THE PETITION

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29pp

## PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Respondent Palisades A/V Company, LLC, has the following parent companies:

Vornado Fort Lee, LLC
c/o Vornado
Park 80 West
Plaza II
Saddle River NJ 07663

Applied Palisades, LLC
c/o Allen Goldman
5 Marine View Plaza
Suite 500
Hoboken NJ 07030

It has no non-wholly owned subsidiaries.

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Palisades A/V Company, LLC, hereinafter "Palisades") the successor in title to the defendant East/West Venture[1], submits this brief in opposition to the petition by Edward and Florence Bojekian (hereinafter "the Bojekians") for certiorari to the New Jersey Supreme Court.

## OPINIONS BELOW

In addition to the three opinions referred to in the petition for certiorari, there was an unreported written opinion by the Law Division of Superior Court in the consolidated matters of East/West Venture v. Borough of Fort Lee et al, Dkt. No. BER-35840-89, and Bojekian v. Fort Lee Planning Board, Dkt. No. BER-L-3983-94, issued on August 10, 1994, which is not reproduced in the appendix to the petition. This opinion incorporated by reference a written report prepared by the court-appointed special master Philip B. Caton and also Mr. Caton's testimony at trial.[2]

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[1]Palisades acquired the property from East/West Venture while the matter was pending before the New Jersey Supreme Court. In accordance with New Jersey practice, the caption in the state court proceeding remained unchanged.

[2]For purposes of this brief, Palisades will refer to the opinion of the trial court as "Trial Op," Caton's written report as "Caton Rep." and the transcript of Caton's trial testimony as "Caton Tr." The decision of the Appellate Division of the New Jersey Superior Court in the Bojekians' first appeal, reported as East/West Venture v. Fort Lee, 286 N.J. Super. 311, 669 A. 2d 260 (App. Div. 1996), will be referred as "East/West" and decision of the Appellate Division in the Bojekians second appeal, which is captioned Edward Bojekian et al v. Fort Lee Planning Board et al, Dkt.

## STATUTES INVOLVED

**New Jersey Rules of Court**

4:69-6. Limitation on Bringing Certain Actions

(a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

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(c) Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires.

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No. A-3359-96T5 (N.J. Sup. Ct., App. Div., April 7, 1998), and is reproduced in the Appendix to the petition for certiorari at A.3-17, will be referred to as "Bojekian Op."

## COUNTERSTATEMENT OF THE CASE

The Statement of the Case submitted by the Bojekians is incomplete and, in some respects, misleading. The procedural history and the facts are set forth in detail in the opinion of the Law Division of the New Jersey Superior Court dated August 10, 1994, and the two opinions of the Appellate Division of the New Jersey Superior Court.

The East/West property, now owned by respondent Palisades, is located approximately one-half mile south of the George Washington Bridge. It consists of 4.88 acres located at the northern end of a stretch of development that is unique in New Jersey--approximately three-fourths of a mile of 30-story apartment buildings atop the Palisades. Trial Op. at 4; Caton Tr. 113-114, 118-19. These buildings tower over the adjoining residential neighborhoods. Trial Op. at 4; Caton Tr. 113-114, 118-119. The sharp contrast between these high rise buildings and the adjoining single family and two family structures, such as that occupied by the Bojekians, is a unique and distinguishing feature of this area. Caton Tr. 114.

The East/West property extends from the foot of the Palisades to the top and has been treated for planning purposes as an integral part of this unique stretch of development for more than two decades. In 1972, the then-owner of an eight-and-a-half acre property that spanned the top and the foot of the Palisades received development approvals to construct a 12-story garage on what is now the East/West property to bring it up to the level of the Palisades and to construct four 30-story towers containing a total of 1,066 units on top of the Palisades and on top of the

extension of the Palisades created by the garage. Caton Tr. 107-108, 11-112; Caton Rep, pp. 31-33. Two 30-story towers including 478 units were constructed on top of the Palisades. The reinforced concrete structure for the 12-story garage was constructed in 1974, but the project was abandoned, leaving the garage unfinished and the remaining 588 dwelling units to be constructed on top of the garage unbuilt. Caton Tr. 108-109.

In 1977, a zoning variance was granted to permit a 30-story hotel to be constructed atop the garage instead of apartments and in 1978 the property was rezoned for commercial uses, including the construction of 30-story hotel atop the 12-story garage. Caton Rep., pp. 31-33. This proposed hotel was never constructed. The property continued to be zoned for commercial development, including a 30-story hotel atop the garage. East/West, 286 N.J. Super. at 322, 669 A. 2d at 265-66.

East/West commenced suit against the Borough of Fort Lee and the Planning Board of Fort Lee in 1988 in the Law Division of Superior Court under the caption East/West Venture v. Borough of Fort Lee et al, Dkt. No. BER-35840-89. East/West, 286 N.J. Super. at 320, 669 A. 2d at 264. The suit alleged that Fort Lee was engaged in zoning that had the effect of systematically excluding low and moderate income persons in violation of the New Jersey Constitution as construed by the New Jersey Supreme Court in Southern Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 151, 336 A. 2d 713 (1975), and 92 N.J. 158, 456 A. 2d 390 (1983). Following entry of summary judgment in favor of the plaintiff in 1989, the parties engaged in protracted settlement negotiations under the supervision of a special master

appointed by the trial court. East/West, 286 N.J. Super. at 320, 669 A. 2d at 264.

In 1994, the parties entered into a settlement agreement which resolved issues related to the East/West site and established a timetable for resolution of the remaining issues concerning municipal compliance with its fair share housing obligation. Id. The agreement has four central provisions:

1) In accordance with a timetable established in the agreement, Fort Lee would rezone the East/West site--which had previously been zoned for a 30-story hotel at the end of the Palisades--to permit construction of a 30-story apartment building.

2) In accordance with a timetable established in the agreement, Fort Lee would rezone a nearby property--referred to in the agreement as the "affordable housing site"--to permit construction of a mid-rise apartment building that would contain 60 units of low and moderate income housing and East/West would construct 60 units of low and moderate income housing on the "affordable housing site" within a fixed period of time, whether or not it proceeded forward with development of the 30-story apartment building.

3) East/West would also contribute $800,000 to a housing trust fund established by the municipality for the purpose of funding the construction and rehabilitation of additional low and moderate income housing.

4) In accordance with a timetable established in the agreement, Fort Lee would formulate a plan to satisfy the

remainder of its fair share of housing obligation. East/West, 286 N.J. Super. at 320-21, 669 A. 2d at 265.

Under New Jersey law, a suit alleging exclusionary zoning is a representative action brought on behalf of low and moderate income persons in the surrounding region. Any negotiated settlement must be approved by the court as fair to the represented class of low and moderate income persons. Morris County Fair Housing County v. Boonton Township, 197 N.J. 359, 484 A. 2d 1302 (Law Div. 1984), aff'd, 209 N.J. Super. 108, 506 A. 2d 1284 (App. Div. 1986). In accordance with this procedure, the parties submitted the agreement to the trial court for its approval. The trial court issued an order approving a form of public notice, establishing a procedure for interested persons to submit objections to the proposed settlement and setting a hearing date. East/West, 286 N.J. Super. at 321, 669 A. 2d at 265.

The Bojekians, who were the owners of residential property near the East/West site, then filed a separate four-count complaint in lieu of prerogative writ challenging the terms of the proposed settlement agreement under the caption Bojekian v. Fort Lee Planning Board, Dkt. No. BER-L-3983-94. East/West, 286 N.J. Super. at 321, 669 A. 2d at 265; Bojekian Op at A.6. All four counts raised issues legal rather than factual in character.[3]

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[3]Count 1 alleged that the settlement agreement had been entered into by Fort Lee without the municipality's first adopting a corresponding change in the municipal master plan and constituted unlawful contract zoning. Count 2 alleged that East/West was barred from entering into the settlement agreement because it was inconsistent with the conditions on variances granted to one or more of its predecessors in title. Count 3 alleged that a public meeting at which the

East/West filed a motion to dismiss this complaint or consolidate it with the East/West v. Fort Lee case. The trial court refused to dismiss the case, but instead consolidated it with the East/West case. East/West, 286 N.J. Super. at 320, 669 A. 2d at 265 The court advised the Bojekians that they could raise their various legal challenges to the agreement at the hearing on approval of the proposed settlement. The Bojekians filed written objections, reciting essentially the same allegations made in their complaint, together with supporting legal argument and citation to various statutes and judicial decisions.

Four other interested parties also filed objections, including the adjoining Borough of Edgewater and Action Motors, another property owner.

The trial court conducted a five-day trial on the proposed settlement. At the hearing, the Bojekians were represented by counsel and participated very actively. The trial court permitted them to present evidence. Edward Bojekian himself testified. In addition, the Bojekians presented the testimony of a planner, a real estate appraiser, and a Bergen County Planning Board employee. They offered 11 documentary exhibits into evidence. In addition, their counsel presented an extended summation and legal argument. The trial court did not permit them to cross-examine witnesses, but it did permit counsel for Edgewater

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settlement agreement was discussed by Fort Lee Borough Council and the Fort Lee Planning Board was conducted in violation of the Open Public Meetings Act. Count 4 alleged that Fort Lee had authorized subdivision of the property without proper notice and public hearing under the Municipal Land Use Law. East/West, 286 N.J. Super. at 319, Bojekian Op. at 4.

Borough, which had made similar objections, to do so.

Following trial, the trial court issued a written opinion rejecting all the objections, including those of the Bojekians. It entered what it characterized as a "final judgment," inter alia, approving the settlement agreement, consolidating the Bojekian case with the East/West case, and dismissing the Bojekian complaint with prejudice. East/West, 286 N.J. Super. at 323, 669 A. 2d at 266. The trial court retained jurisdiction to review the municipal compliance plan to meet the remainder of its fair share housing obligation. East/West, 286 N.J. Super. at 319 n.2, 329, 669 A. 2d at 264 n.2, 269.

A number of the objectors, including the Bojekians and Edgewater Borough, appealed the decision of the trial court to the Appellate Division of the New Jersey Superior Court. They did not seek a stay.

While the appeal was pending, Fort Lee proceeded on October 27, 1994, to adopt the ordinance amendments provided for in the settlement agreement, and the Fort Lee Planning Board proceeded on June 19, 1995, to adopt the master plan amendments provided for in the agreement. Bojekian Op. at A.10-11. By New Jersey court rule, any suit challenging the legality of a municipal ordinances or a master plan amendments--denominated in New Jersey practice as a "proceeding in lieu of prerogative writ"--must be filed within 45 days of the municipal action. N.J. R. Ct. 4:69-6(a). A suit challenging adoption of the ordinance amendment would have had to be filed on or before November 11, 1994. Similarly, a suit challenging adoption of the master plan amendments would have had to be filed on or before July 24, 1995.

One objector, Edgewater Borough, elected to file a timely suit challenging the ordinance amendments, which was subsequently voluntarily dismissed. A different objector, Action Motors, elected to file a timely suit challenging the master plan amendments, which was dismissed on the motion of Fort Lee. The Bojekians, although represented by the same counsel as Action Motors, elected not to file suit challenging either action or to intervene in either of the suits filed by other parties. Bojekian Op. at A.11.[4]

The Appellate Division affirmed the decision of the trial court, with certain modifications. Following Morris County Fair Housing Council v. Boonton, supra, it reaffirmed that an exclusionary zoning case could be resolved by negotiated settlement, provided that the trial court established a procedure for the receipt and consideration of objections and made a finding that the agreement was fair and reasonable to low and moderate income persons. East/West, 286 N.J. Super. at 327-28, 669 A. 2d at 268-69. It held that the trial court in the present case had properly found that the settlement agreement was fair and reasonable to low and moderate income persons. The Appellate Division held, however, that in the ordinary instance a trial court should do no more than this. It should not render any opinion as to whether the proposed ordinance and master plan would be lawful or represent sound planning, since those issues are not ripe or properly before it. Instead it should leave any issues as to the legality and propriety of the proposed zoning ordinance and master plan amendment to be raised, if at all, in a separate proceeding in lieu of

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[4]The opinion of the Appellate Division erroneously states that Action Motors also challenged the adoption of the ordinance.

prerogative writ that could be brought by interested persons once the master plan amendments and ordinance had been adopted and that would be governed by the usual substantive and procedural standards for such litigation. East/West, 286 N.J. Super. at 327-29, 669 A. 2d at 268-69.

The Appellate Division held, however, that because Edgewater held in fact fully litigated all the substantive issues raised by the objectors (including those raised by the Bojekians), the trial court had acted properly in deciding those issues. The Appellate Division affirmed the trial court on all those issues and held that Edgewater would be barred from relitigating those issues in the context of any challenge to the adoption of the zoning ordinance or master plan. East/West, 286 N.J. Super. at 324-33, 340-41, 669 A. 2d at 266-71, 275. As to the Bojekians (and others similarly situated) whose participation in the trial had been somewhat more limited, the Appellate Division held that the decision of the trial court did not affect their right to bring separate proceedings challenging the adoption of the master plan amendments and zoning ordinance, if they so chose. East/West, 286 N.J. Super. 330-333, 669 A. 2d at 270-71.

Finally, the Appellate Division held that the decision of the trial court was not a final judgment, since it did not fully resolve the issue of compliance by Fort Lee with its entire constitutional fair share housing obligation. East/West, 286 N.J. Super. at 319 n.2, 329, 669 A. 2d at 264 n.2, 269.

As noted above, the Bojekians--unlike other parties--had elected not to file a timely action in lieu of prerogative writ challenging the adoption of the master plan amendments and zoning ordinance implementing the settlement. Instead,

on February 22, 1996, more than a year after the zoning ordinance was adopted, they filed a motion captioned in their prior proceeding (whose dismissal with prejudice had been affirmed by the Appellate Division) to "reinstate" the original complaint challenging the settlement and to permit them to file a "supplemental complaint" belatedly challenging the zoning and master plan amendments. Bojekian Op. at A.11. The trial court treated this motion as an attempt by the Bojekians to file a complaint in lieu of prerogative writ outside the 45-day period authorized by N.J. R. Ct. 4.69-6 and for a waiver of the 45-day period under N.J. R. Ct. 4:69-6(c). It denied the motion by order dated April 15, 1996. Bojekian Op. at A.11-12.[5]

Following the submission by Fort Lee of a compliance plan to meet the remainder of its fair share housing obligation[6], the trial court entered a final judgment in East/West Venture v. Fort Lee on January 15, 1997.

The Bojekians then filed the present appeal to the Appellate Division of Superior Court. The appeal challenged only the order of the trial court denying the Bojekians' motion to "reinstate" and "supplement" their prior complaint. Before the Appellate Division, the Bojekians did not raise any

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[5] An immediate appeal taken by the Bojekians from this decision was dismissed by the Appellate Division on the grounds that this order of the trial court was interlocutory.

[6] The Bojekians filed objections to this plan and sought to appear and present evidence at this hearing. Their objections, however, were not directed to the compliance plan, but to the East/West agreement and the rezoning of the East/West site. The trial court rejected these objections and the Bojekians' proffered testimony as irrelevant.

federal constitutional issues. They challenged the trial court's construction and application of N.J. R. Ct. 4:69 and they asserted its actions violated their rights under the so-called "prerogative writ clause" of the New Jersey Constitution. N.J. Const. art. 6, §5, ¶ 4. Bojekian v. Fort Lee Planning Board, Brief of Appellants (N.J. Sup. Ct., App. Div.)

By decision dated April 7, 1998, the Appellate Division affirmed, holding that the trial court properly found that the challenges to the master plan amendments and zoning ordinance were out of time under R. 4:69-6 and properly exercised its discretion in refusing to waive the 45-day limit under R. 4:69-6. Bojekian Op. at A.15-17. The Appellate Division noted that its prior decision was not intended to create additional procedural rights in the Bojekians or other objectors, but merely to clarify that whatever right they had to bring suit to challenge the adoption of the master plan amendments and zoning ordinance remained unaffected by the decision of the trial court approving the settlement agreement. Bojekian Op. at A.13-15. The Appellate Division did not decide any federal constitutional issue.

The Bojekians filed an appeal as of right to the New Jersey Supreme Court from the April 7, 1998, decision of the Appellate Division. Such appeals are authorized by the New Jersey Constitution, N.J. Const. art. 6, §5, ¶1, and court rule, N.J. R. Ct. 2:2-2(a)(1), where the case involves a "substantial constitutional issue arising under the Constitution of the United States or this State."

Respondent East/West Venture filed a motion to dismiss the appeal on the grounds that the only constitutional

issue raised before the Appellate Division--violation of the "prerogative writ clause" of the state constitution--was not substantial. In their answering brief, the Bojekians raised for the first time claims of violation of procedural due process under the United States Constitution. By order dated September 23, 1998, the New Jersey Supreme Court dismissed the appeal for failure to state a substantial constitutional question.

## REASONS FOR DENYING THE PETITION

### I. THE ISSUES PRESENTED IN THE PETITION WERE NOT PROPERLY RAISED BELOW

The Bojekians assert that this case raises substantial issues under the Due Process Clause of the United States Constitution. They did not raise any such federal constitutional issues below before the Appellate Division of the New Jersey Superior Court. To be precise, the Bojekians' first point heading in their brief to the Appellate Division alluded to violations of the federal constitution, but the argument they made under that heading was devoted entirely to claims that the actions of the trial court had violated the "prerogative writ clause" of the New Jersey Constitution. They made no reference in the argument to the federal constitution or to any cases construing the federal constitution. Bojekian v. Fort Lee Planning Board, Brief of Appellants 22-26 (N.J. Sup. Ct., App. Div.)

The failure of the Bojekians to raise any issue under the federal constitution is accurately reflected in the opinion of the Appellate Division, which does not consider or decide any federal constitutional issue.

The Bojekians first sought to raise issues under the federal constitution in their brief in opposition to the motion by East/West Venture to dismiss their appeal to the New Jersey Supreme Court for failure to state a substantial constitutional question. Because the Bojekians did not present any federal constitutional issue in the Appellate Division, they were precluded under New Jersey practice from asserting a federal constitutional issue as a basis for appeal as of right to the New Jersey Supreme Court. Deerfield Estates, Inc. v. East Brunswick, 60 N.J. 115, 119-121, 286 A. 2d 498, 500-501 (1972).

While the order of the New Jersey Supreme Court summarily dismissing the appeal did not specify that the Bojekians were precluded from raising these issues, it did dismiss the appeal for failure state a substantial constitutional question.

It is well established that this Court cannot consider any issue not properly not raised in the state court appellate proceedings below. Beck v. Washington, 369 U.S. 541, 543 (1962); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n. 6, 334-36 (1969). Because the issues in the petition for certiorari were not properly raised below, the Court should deny the petition.

## II. THE PETITION PRESENTS NO SUBSTANTIAL OR NOVEL ISSUES THAT REQUIRE REVIEW BY THIS COURT

On its face, the petition presents three questions. None of these questions presents any substantial or novel issue of federal constitutional law that requires review by this

Court. We shall discuss each question in turn.

The Bojekians state the first question as follows:

> Should the escarpment of the Palisades Cliffs--one of the tri-state region's most precious natural features -- be destroyed by a structural tower constructed at the base of the rock face, without access to the courts and an opportunity on the part of New Jersey residents whose properties on the cliffs are specially injured, to challenge the rezoning amendments required by Fort Lee's settlement agreement with a private developer?

As set forth above, this question does not accurately portray the facts of this case. The case does not involve the issue of whether the "escarpment of the Palisade Cliffs . . . [should] be destroyed by a structural tower constructed at the base of the rock face." The portion of the structure at the base of the Palisades is the twelve story concrete garage structure, which was constructed more than twenty years ago. The construction of this garage has never been at issue in this case. What has been at issue is whether the building constructed on top of the garage should be a 30-story hotel--as authorized by the zoning variance and the zoning ordinance--or a 30-story apartment building provided for the settlement agreement.

Moreover, the Bojekians have not been denied access to the courts. They had two opportunities to present their legal arguments to the courts. They were entitled to

appear and oppose court approval of the settlement agreement. They were also entitled to bring suit to challenge the adoption of the implementing ordinances or master plan amendments.

They availed themselves of the first opportunity. Although the Bojekians' complaint and their written objections to the settlement were purely legal in character, the trial court permitted them to participate in the evidentiary hearing. They presented evidence, including evidence only tenuously related to the issues raised by their complaint or written objections. Edward Bojekian himself testified. The Bojekians presented the testimony of a planner, a real estate appraiser, and a Bergen County Planning Board employee. They offered 11 documentary exhibits into evidence. In addition, counsel presented an extended summation and legal argument. The trial court did not permit them to cross-examine witnesses, but it did permit counsel for Edgewater Borough, which had made similar objections, to do so.

Following trial, the trial court issued an extensive written opinion addressing with specificity all the legal issues raised by the Bojekians in their complaint and their written objections, as well additional issues that they raised during the course of the trial.

On appeal, the Appellate Division held that, insofar as the trial court did more than decide whether the settlement was fair and reasonable to low and moderate income persons, it had decided more than it needed to. East/West, 286 N.J. Super. at 327-29. The Appellate Division held, however, that Edgewater had in fact fully litigated all the substantive issues raised by the objectors (including those

raised by the Bojekians). The Appellate Division reviewed the trial court's decision on all those issues, including all the issues raised by the Bojekians, and affirmed the decision of trial court on all those issues. East/West, 286 N.J. Super. at 324-33, 340-41.

The Appellate Division held that Edgewater would be barred from relitigating those issues in the context of a challenge to the adoption of the zoning ordinance or master plan. East/West, 286 N.J. Super. at 324-33, 340-41. As to the Bojekians (and others similarly situated), the Appellate Division held that the decision of the trial court did not affect their right to bring separate timely proceedings challenging the adoption of the master plan amendments and zoning ordinance, if they so chose. East/West, 286 N.J. Super. 330-333.

The Bojekians, however, elected not to file suit challenging the adoption of the master plan amendment and zoning ordinance within the 45-day time period provided for by N.J. R. Ct. 4:69-6. Instead, they sought to circumvent those rules through the ploy of filing a motion to "reinstate" and "supplement" a complaint that had been dismissed with prejudice more than a year earlier and that had never addressed the legality of the master plan or zoning amendments. The trial court recognized the Bojekians' ploy for what it was, and treated it as an attempt to file an complaint in lieu of prerogative writ challenging the adoption of the master plan amendments and zoning ordinance outside the time period specified by N.J. R. Ct. 4:69-6.

The trial court gave full consideration to the Bojekians' argument that exceptional circumstances justified

permitting the filing of an untimely complaint under N.J. R. Ct. 4:69-6(c). Finding no such circumstances, the trial court denied the motion and, on appeal, the Appellate Division affirmed.

Thus, this is not a case of the trial court improperly closing the courthouse door to litigants who have properly invoked its jurisdiction. Rather, this is a case of litigants who, for whatever reason, elected to disregard the New Jersey Rules of Court and were properly barred by the trial court from circumventing those rules.

This raises no issue of procedural due process under the United States Constitution. This Court has consistently held that the states can establish reasonable limitation periods for the filing of litigation and, having done so, action by the courts cutting off the rights of litigants who do not adhere to those limitation periods violates no right protected by the Constitution. Texaco, Inc. v. Short, 454 U.S. 516 (1982); Wilson v. Isemenger, 185 U.S. 55 (1902). As the Court observed in Logan v. Zimmerman Brush Co, 455 U.S. 422 (1982):

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. [455 U.S. at

437 (citations omitted).]

States have broad discretion to determine for themselves how long or short to set limitation periods. Chase Securities v. Donaldson, 325 U.S. 304 (1945). New Jersey has elected to grant citizens very broad rights to challenge the actions of public entities, but to place strict time limits on those challenges. This reflects a strong state policy that, on one hand, public entities should be accountable to the public for the legality of their actions, and, that, on the other, public entities should be able to proceed promptly with the public's business free of lingering uncertainty that litigation might be filed at some point in the indefinite future. Washington Township Zoning Board of Adjustment v. Washington Township Planning Board, 217 N.J. Super. 215, 224-25, 525 A.2d 331, 336 (App. Div.), certif. denied, 108 N.J. 218, 528 A. 2d 36 (1987).

Thus, rejection by the Law Division of the Bojekians' effort to bring a challenge to adoption of the ordinance or master plan amendments more than a year out of time violates no rights protected by the Constitution. The Bojekians' claim that the Law Division's denial of their motion violated the Due Process Clause of the Fourteenth Amendment raises no novel or substantial issue.

The Bojekians state the second question as follows

> By refusing access to the state courts to hear a property owner's complaint challenging a land use settlement, did the state courts unconstitutionally violate and deny plaintiffs' rights to defend their property and to secure

due process of law under the Fifth and Fourteenth Amendments?

Although this question is cast in terms of the Bojekians' property rights, the Bojekians have no property rights in the whether the adjoining property is zoned for a 30-story hotel or a 30-story apartment building. It is essentially a restatement of the same constitutional claims raised in the Bojekians' first question. For the same reasons, it raises no novel or substantial issue.

The Bojekians state the third question as follows:

> In promising a high-rise developer that it would rezone plaintiffs' low-rise residential district, did the local zoning officials, by prejudgment, convert the land use hearing process into a charade, in violation of the Fourteenth Amendment's guaranty of an opportunity to be heard in defense of property rights?

The Bojekians' attack on the settlement agreement focuses on the provision that requires the Fort Lee Planning Board to adopt master plan amendments that implement the settlement to the exclusionary zoning litigation The state courts have upheld the legality of the agreement under New Jersey law. The Bojekians claim, however, that this provision of the settlement agreement denies them procedural due process because it denies them the right to influence the decision of the planning board in making amendments to the municipal master plan, specifically, the right "to make impressionable contact with the powers of

decision."

This claim is, however, based upon a fundamental error. In formulating or amending a municipal master plan as part of the zoning process, the municipal planning board makes broad policy determinations as to the future shape of the municipality. N.J.S.A. 40:55D-28. It establishes policies of general application that govern the nature and intensity of land development and redevelopment that will be permitted in the various sections of the municipality. Adoption of a master plan is an integral part of the process of adopting a zoning ordinance in New Jersey. By statute, a municipality may not adopt a zoning ordinance unless the municipal planning board has first adopted a master plan and the zoning ordinance must be "consistent with" and "designed to effectuate" the master plan. N.J.S.A. 40:55D-62. These actions are legislative in character, not judicial or quasi-judicial. They involve policy making and line-drawing functions, they are prospective rather than retrospective, and they affect the public generally. Jodeco, Inc. v. Hann, 674 F. SUPP. 488, 495 (D.N.J.1987); Girard v. Alverez, 144 N.J. Super. 259, 262, 365 A. 2d 220, 221 (App. Div. 1976); Timber Properties, Inc. v. Chester Township, 205 N.J. Super. 273, 284, 500 A. 2d 757, 763-4 (Law Div. 1984); T & M Homes, Inc. v. Mansfield, 162 N.J. Super. 497, 512-513, 393 A. 2d 613, 621 (Law Div. 1978); see generally, Wollen v. Fort Lee, 27 N.J. 408, 421-422, 142 A. 2d 881, 888-89 (1958).

The Bojekians' petition muddles this critical point by confounding the function of a planning board in formulating and amending a municipal master plan with its function in making a decision on an individual application for site plan or

subdivision approval.[7] While the New Jersey legislature has assigned both of these functions to the same body--the municipal planning board--they are fundamentally different in character. They former is legislative; the latter may be quasi-judicial. See, e.g., Kotlarich v. Ramsey, 51 N.J. Super. 520, 540-41, 144 A. 2d 279, 290-91 (App. Div. 1958).

While constitutional principles of procedural due process may guarantee the right to "impressionable contact with the powers of decision" in judicial and quasi-judicial proceedings, they guarantee no such rights in proceedings that are legislative in character. Bi-Metallic Investment Corp. v. State Board of Equalization, 239 U.S. 441, 445 (1915); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 108 (1978).

States have broad discretion to determine how legislative functions are to be performed. They may assign these responsibilities to elected bodies or appointed administrative bodies. They may require elaborate public notice and hearings, or none at all. They may demand that deliberations be conducted in public, or permit (or even require) them to be conducted in private. They may prohibit negotiations with particularly affected parties or mandate such negotiations. The Due Process Clause leaves the states broadly free to establish their own processes for performance of legislative functions. As the Court declared more than eighty years ago:

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[7]For example, the Bojekians suggest that the proceedings of the Planning Board were governed by N.J.S.A. 40:55D-10(a). This provision, however, applies only to individual applications for development approvals.

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. [Bi-Metallic, 239 U.S. at 445.]

The mere fact that a zoning ordinance may incidentally reduce the values of adjacent properties does not give the owners of those properties a constitutional right to prior personal notice or a judicial hearing. The Bojekians do not claim that their own property has been regulated into inutility, see, e.g., Agins v. Tiburon, 447 U.S. 255 (1980), merely that they will suffer incidental harm as a result of the rezoning of a different property. The federal constitution does not protect property owners from such incidental detriments or creates any special procedural rights where such incidental injury is threatened. Cf. Penn Central

Transportation Co. v. New York City, 438 U.S. 104 (1978); Belle Terre v. Boraas, 416 U.S. 1 (1974); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Like the first two questions, the Bojekians' third question raises no novel or substantial constitutional issue that requires review by this Court.

## CONCLUSION

For all the foregoing reasons, respondent Palisades A/V Company, LLC, respectfully urges the Court to deny the Bojekians' petition for certiorari to the New Jersey Supreme Court.

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Respectfully submitted,
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